BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TAMARA ENDERUD	)	
Claimant	)	
VS.	)	
	)	Docket No. 239,691
GORDON-PIATT ENERGY GROUP	)	
Respondent	)	
AND	)	
	)	
INDEMNITY INS. CO. OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Claimant appealed the May 15, 2000 Award entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on October 13, 2000.

APPEARANCES

Claimant appeared by her attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Vincent A. Burnett of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) denied claimant permanent partial disability compensation, finding claimant's injury was only a temporary aggravation of a preexisting condition.

On appeal, claimant contends that she has proven a permanent injury and, in addition, has permanent restrictions and limitations which have prevented her from returning to her regular work with respondent. Because of this, claimant argues she is

entitled to a permanent partial disability award based on a work disability. Claimant also challenges the ALJ's calculation of her gross average weekly wage and compensation rate.

Respondent contends that, except for the calculation of the claimant's average weekly wage, the ALJ's Award should be affirmed. Contrary to the argument by claimant, however, respondent contends that the claimant's average weekly wage is in fact less than rather than greater than that found by the ALJ.

The nature and extent of claimant's injury and resulting disability and the claimant's average weekly wage are the only issues raised for Board review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant has a history of low back problems dating back to at least September 27, 1991 when she suffered an accidental injury while working for a previous employer. One of her treating physicians at that time was neurosurgeon Paul S. Stein, M.D. Dr. Stein diagnosed a chronic lumbar strain with some disc deterioration. He did not think surgery would benefit claimant and, therefore, provided conservative treatment. Dr. Stein last saw claimant on March 13, 1992 at which time he rated claimant's impairment as 10 percent to the body as a whole and recommended restrictions of light to medium work, maximum lifting of 35-40 pounds infrequently and 20 pounds moderately frequently with no repetitive bending or twisting of the lower back. Dr. Stein defined repetitive as more than four times per hour. When questioned about his impairment rating, Dr. Stein believed, if he used the Guides, he would have used the Third Edition, Revised. At that time the Third Edition, Revised, would have been the most current edition available.[1]

Dr. Stein believes that, in general, the ratings given under the Fourth Edition of the Guides are lower than the ratings given under the Third Edition. As far as what rating he would have given claimant in 1992, had the Fourth Edition been available Dr. Stein's best guess is that claimant would fall within a DRE category II which would be a 5 percent impairment.

Claimant began working for respondent on December 18, 1997. She informed respondent of her back injury and restrictions when she was hired as a materials handler. That job required claimant to retrieve parts from the warehouse and deliver them to various departments. In April 1998 claimant moved to the sheet metal department as a spot

[1] "The American Medical Association strongly discourages the use of any but the most recent edition of the *Guides*, because the information in it would not be based on the most recent and up-to-date material." Guides to the Evaluation of Permanent Impairment, Fourth Edition, p. 5.

welder. Both of these jobs required repetitive bending and twisting of her low back. Claimant would usually get assistance when lifting objects weighing more than 35 to 40 pounds. She injured her low back on October 1, 1998 lifting a piece of material weighing over 70 pounds with a co-worker.

Philip R. Mills, M.D., examined claimant on February 11, 1999 pursuant to a court ordered independent medical examination. He diagnosed claimant with bulging discopathy with possible lateral spinal stenosis. In his opinion claimant's injury was an aggravation of her preexisting condition. Dr. Mills reported that claimant had reached maximum medical improvement on April 16, 1999 and issued an impairment rating of 10 percent to the body as a whole, which is a DRE category III, pursuant to the AMA Guides, Fourth Edition. Dr. Mills opined that from his review of the records it would appear that claimant's preexisting condition would be a DRE lumbo sacral category II, which is a 5 percent impairment. Dr. Mills recommended permanent restrictions of light duty, working only with good body mechanics and being able to change positions on an as needed basis from sitting to standing. In addition, Dr. Mills recommended claimant use a cane to assist with ambulation. Dr. Mills believes that claimant is subjectively worse now than she was before her accident of October 1, 1998. He agreed with and adopted as his own the task loss opinions of both vocational experts, James Molski and Karen Terrill.

When claimant presented respondent with Dr. Mills' restrictions she was told they could not be accommodated and she was terminated.[2] Although she has looked for work within her restrictions claimant remains unemployed.

Because claimant suffered an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee

[2] *See* Claimant's Exh. 2 and 3 to the Reg. H. Tr.

> is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[3] and Copeland.[4] In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. Neither the presumption nor the wage earning ability test are in the current statute, but in reconciling the principles of Foulk to the new statute, the Court of Appeals in Copeland held that for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wages should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.[5]

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[6]

For a time claimant kept a record of places she contacted about work.[7] During this period from May through August 1999 claimant contacted 121 employers. Thereafter, claimant stopped keeping a record but estimates she has applied at two or three places a week since August of 1999. In addition, she has registered with Kansas and Oklahoma employment agencies. The Board finds claimant has made a good faith effort to find employment. Accordingly, her wage loss prong of the two-part work disability test should be based upon her actual earnings. In this case, as she is unemployed and has no earnings, her wage loss is 100 percent.

The record contains task loss opinions from two vocational experts, James Molski and Karen Terrill. As stated, Dr. Mills adopted both their opinions as his own. The differences between their opinions includes how they separated jobs into tasks. Claimant held numerous jobs during the relevant 15-year time period. Several of those jobs were

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[3] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[4] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *See* Gadberry v. R. L. Polk & Co., 25 Kan. App. 2d 800, 802, 975 P.2d 807 (1998).

[6] Copeland at 320.

[7] Claimant's Ex. 9 to Reg. H. Tr.

similar and had similar or duplicative tasks. Also, as one might expect, claimant's recollection of the dates she worked in some of these jobs is somewhat vague. Mr. Molski opined that claimant had lost 14 out of 40 tasks for a 35 percent task loss. Ms. Terrill presented several task loss scenarios, including time weighted and percentages taking into consideration tasks lost due to preexisting limitations. The Board, however, considers it inappropriate to eliminate tasks that claimant performed during the relevant 15-year period prescribed by statute. K.S.A. 44-501(c) mandates that "[a]ny award of compensation shall be reduced by the amount of functional impairment determined to be preexisting." When comparing ratings pursuant to the same edition of the AMA Guides, respondent has proven a preexisting 5 percent functional impairment.[8] It would be inappropriate to also subtract preexisting task loss, if any, as this would be doubling up the reduction for the preexisting condition. Also, claimant testified that after her prior injury in 1991, she could, and in fact did, perform most if not all of the job tasks she had performed before, with the one exception of raising pigs.

Comparing apples to apples, Ms. Terrill's task loss opinion, without time weighting and without adjustment for preexisting condition, was that claimant had lost either 4 or 5 of the 106 tasks identified or between 3.78 percent and 4.72 percent depending upon whether or not claimant's or respondent's description of the job she performed with respondent is used. In this instance, the Board does not find Ms. Terrill's task loss opinion credible when adjusted to utilize the job description provided by respondent. Under that scenario, Ms. Terrill does not show claimant as having lost the ability to perform any of the job tasks she performed for respondent despite the fact that respondent told claimant that it could not accommodate Dr. Mills' restrictions. The Board finds claimant could not return to her regular job duties with respondent under the restrictions recommended by Dr. Mills. Accordingly, the Board rejects Ms. Terrill's 3.78 percent task loss opinion and accepts instead the 4.72 percent opinion that utilized claimant's job description. Like Dr. Mills, the Board believes claimant's true task loss lies somewhere between the opinions expressed by Ms. Terrill and Mr. Molski. Therefore, averaging the 4.72 percent task loss opinion given by Ms. Terrill with the 35 percent task loss opinion by Mr. Molski, the Board finds claimant sustained a 20 percent task loss pursuant to the opinions of Ms. Terrill and Mr. Molski and adopted by Dr. Mills. Averaging a 20 percent task loss with a 100 percent wage loss results in a work disability of 60 percent. After subtracting the 5 percent preexisting impairment, claimant is entitled to a 55 percent permanent partial general body disability award.

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[8] Respondent incorrectly argues that it is claimant's burden to prove the percentage of functional impairment that preexisted the subject injury. Rather, proving claimant's preexisting impairment under K.S.A. 44-501(c) is respondent's burden of proof. *See* Hanson v. Logan U.S.D. 326, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* ___ Kan. ___ (2001).

At the Regular Hearing when the ALJ asked if there was an agreement on average weekly wage, counsel for claimant announced:

> MR. RIEDMILLER: No. We have a straight time of $7.98 an hour, 40 hours a week, $319.20, which I think has been agreed to. We had an average overtime of $125.98 per week which I think was agreed to but the fringe benefit issue was not agreed to. There was a 401K contribution made by the employer and a couple of other contributions made by the employer and not all of that information I believe has been forthcoming or at least there is an issue there as to the extent of fringe benefits.[9]

The ALJ ordered temporary total disability compensation paid at the rate of $294.95 per week. Claimant's Brief in Support of Her Request for Review argues for a gross average weekly wage of $445.18 and a compensation rate of $296.80. There is no explanation as to how these figures were arrived at other than that they reflect a straight time pay of $319.20 per week and an average overtime pay of $125.98 per week, citing Claimant's Exhibit 10 to the Regular Hearing transcript. Respondent, on the other hand, argues for a gross average weekly wage of $434.44 based upon a base wage of $306.40 ($7.66 per hour X 40) and an average weekly overtime of $128.04. This would result in a compensation rate of $289.64. In their briefs, neither party includes any additional compensation or fringe benefits. Attached as Exhibit A to Appellee Brief of Respondent and Insurance Carrier and identified as a "wage statement" is an itemization of the pay stubs attached as exhibits to the regular hearing transcript. The Board finds respondent's itemization to be accurate and finds claimant's gross average weekly wage is $434.44 and her compensation rate is $289.64.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated May 15, 2000, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Tamara Enderud, and against the respondent, Gordon-Piatt Energy Group, and its insurance carrier, Indemnity Insurance Company of North America, for an accidental injury which occurred October 1, 1998 and based upon an average weekly wage of $434.44 for 16.29 weeks of temporary total disability compensation at the rate of $289.64 per week or

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[9] Reg. H. Tr. at 6-7.

$4,718.24, followed by 227.54 weeks at the rate of $289.64 per week or $65,904.69, for a 55% permanent partial general disability, making a total award of $70,622.93.[10]

As of July 20, 2001, there is due and owing claimant16.29 weeks of temporary total disability compensation at the rate of $289.64 per week or $4,718.24, followed by 129.85 weeks of permanent partial compensation at the rate of $289.64 per week in the sum of $37,609.75 for a total of $42,327.99, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $28,294.94 is to be paid for 97.69 weeks at the rate of $289.64 per week, until fully paid or further order of the Director.

Respondent is ordered to pay all reasonable and related medical expenses.

Future medical is awarded upon proper application to and approval by the Director.

An unauthorized medical allowance of up to $500 is awarded upon presentation to respondent of an itemized statement verifying same.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Ireland Court Reporting	
Regular Hearing Transcript	$335.00
Preliminary Hearing Transcript	$111.80
Barbara Terrell & Associates	
Deposition of Paul Stein, M.D.	Unknown
Deposition of Philip R. Mills, M.D.	Unknown
Court Reporting Service	
Deposition of Tamara Stone-Enderud	$215.15
Deposition of James Molski	$296.90
Deposition of Karen Crist Terrill	$240.90

[10] Claimant last worked for respondent on or about October 21, 1998. Accordingly, she worked approximately three weeks after her date of accident and, if she was paid 90 percent or more of her average weekly wage during this period, she would be entitled to permanent partial disability compensation based upon her percentage of functional impairment and not a work disability. However, this would not result in any difference in benefits and, therefore, it is not separated out in the award calculation.

IT IS SO ORDERED.

Dated this ____ day of July 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
Vincent A. Burnett, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director